



Signed and Filed: July 7, 2022

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case No. 20-30819-DM
)
BENJA INCORPORATED,) Chapter 7
)
)
Debtor.)
)
_____)
)
KYLE EVERETT, TRUSTEE IN) Adversary Case No. 21-03060-DM
BANKRUPTCY,)
)
Plaintiff,)
)
v.) Date: October 17, 2022
) Time: 9:30 AM
THOMAS B. PETERS,) Via Zoom Video
)
Defendant.)
)
_____)

SCHEDULING ORDER FOR:

- [X] REMOTE TRIAL IN ADVERSARY PROCEEDING
[] FINAL HEARING ON MOTION FOR RELIEF FROM STAY
[] TRIAL ON OBJECTIONS TO CLAIM
[] HEARING ON OBJECTIONS TO CONFIRMATION OF CHAPTER ____ PLAN
[] OTHER: _____

1 [X] A Scheduling Conference in this adversary proceeding
2 [] A preliminary hearing on this motion for relief from
3 stay
4 [] A hearing regarding objections to claim
5 [] A prehearing conference regarding objections to
6 confirmation of plan
7 [] Other: _____

8 was held on April 29, 2022.¹

9 Appearances were as follows:

10 [X] For plaintiff Kyle Everett, Stephen Finestone, Esq.;
11 [X] For defendant Thomas B. Peters, Michael St. James, Esq.;
12 [] For Debtor(s): _____;
13 [] For Moving Party: _____;
14 [] For Trustee: _____;
15 [] For Creditor: _____ ("Creditor"),
16 _____;
17 [] For United States Trustee: _____;
18 [] Other(s): _____
19 _____.

20 Upon due consideration, the court hereby enters the
21 following scheduling order.

22 **TRIAL**. The trial or hearing ("Trial") on the above
23 matter(s) will commence on the Date and Time of Trial, set forth
24 below and to be held via Zoom Video. The Time Reserved for
25 Trial is also shown below. During the week prior to the Trial,
26 the court may move the starting time or day. The court's
27 _____

28 ¹ A continued scheduling conference was held on June 24, 2022,
neither of the parties appeared.

1 Calendar Clerk/Courtroom Deputy will advise the parties of any
2 such change by telephone or e-mail. **All parties are cautioned**
3 **to be prepared to adjust their schedules accordingly.**

4 The court is closed to an in-person trial as a result of
5 the dangers presented by the COVID-19 pandemic. In accordance
6 with Federal Rule of Civil Procedure 43(a), made applicable here
7 by Federal Rule of Bankruptcy Procedure 9017, for good cause in
8 compelling circumstances and with appropriate safeguards, the
9 court may permit testimony by contemporaneous transmission from
10 a location other than the courtroom. The court finds that the
11 public danger presented by the COVID-19 pandemic merits
12 application of this rule as to all witnesses who may remotely
13 testify at the Trial, through the use of video conferencing
14 technology.

15 Further, the court finds that these procedures will provide
16 adequate safeguards for purposes of Federal Rule 43(a) and
17 ensure due process of law. These procedures will (i) enable the
18 court to identify, communicate with, and judge the demeanor of
19 all witnesses in real time, (ii) enable counsel for the parties
20 to see and hear the witness testimony, interpose objections, and
21 communicate with the court in real time, (iii) enable the
22 parties, the witnesses and the court to have simultaneous access
23 to an identical set of pre-marked exhibits, (iv) avoid any undue
24 influence or interference with the witnesses in connection with
25 their testimony, and (v) preserve the ability of any witness to
26 be represented by counsel during the proceeding, and to
27 communicate with such counsel as the court deems appropriate.

1 Participants in the Trial will be connected with the
2 courtroom but will not be physically present. The court staff
3 will provide a link or URL (internet address) to the persons
4 identified by the parties.

5 Participation by telephone alone is unacceptable except by
6 prior agreement of the opposing party or counsel and prior
7 approval of the court. A party or witness not able to appear,
8 and be seen and heard via Zoom will not be permitted to testify.
9 Each participating attorney and each witness must have
10 simultaneous access to a computer, equipped with a camera, that
11 is capable of receiving and transmitting audio and video, or a
12 tablet or smart phone, that satisfy the following requirements:
13 (1) Internet browsing software that is adequate to facilitate
14 the court's video hearing provider, (2) an Internet connection
15 with bandwidth adequate to support the individual's use of the
16 video hearing provider, and (3) Adobe Acrobat Reader for
17 purposes of reviewing exhibits, as directed by counsel or the
18 court. The device must have sufficient video and audio
19 capabilities to allow the speaker to hear and be heard by other
20 participants on a consistent basis. Further, the attorney or
21 witness using it must be situated in a location with wi-fi,
22 cellular, or other service adequate to provide clear audio and
23 video.

24 No later than **October 11, 2022**, the parties shall provide
25 to the courtroom deputy (Ms. Lorena Parada,
26 Lorena_Parada@canb.uscourts.gov, 415-268-2323), and to each
27 other, a list of all attorneys and witnesses who will
28 participate in the Trial, together with an email address and

1 telephone number for each. The telephone number provided should
2 be a number at which the attorney or witness can be reached
3 during the Trial in the event of an interruption of the video or
4 audio feed. This requirement is in addition to any requirements
5 previously or subsequently established by the court for the
6 parties to disclose to each other, by a date certain, the
7 identity of the witnesses they intend to present at trial.

8 **MOTIONS**. Unless otherwise ordered, (a) motions to join
9 other parties and to amend the pleadings must be filed not later
10 than **30** days after entry of this Scheduling Order and (b)
11 motions for summary judgment must be heard no later than **30**
12 calendar days before the Date and Time of Trial.

13 **DISCOVERY**. Discovery shall be completed by the Discovery
14 Deadline shown below. Completion means that depositions must be
15 concluded, although not necessarily transcribed. As to written
16 and production discovery, responses must be due before the
17 Discovery Deadline. The court will attempt to resolve all
18 discovery disputes on an expedited basis via telephonic
19 conference, which any party may initiate by request to Ms.
20 Parada, and notice to the other party after they have met and
21 conferred and made a good faith effort to resolve the dispute.
22 The party requesting the conference should submit a brief letter
23 or e-mail to Ms. Parada explaining the issues to be presented;
24 the other party may submit a brief letter or e-mail in the same
25 manner.

26 The Discovery Deadline may be extended by the parties by
27 agreement, without an order of the court.

1 **EVIDENCE**. On motions for relief from stay, testimonial
2 evidence at the Trial must be presented by written
3 declaration(s) or deposition excerpt(s), unless the court by
4 order allows oral testimony. B.L.R. 4001-1(e). Any motion for
5 permission to introduce any oral testimony (including by cross-
6 examination of the other party's declarant(s) or deponent(s))
7 shall be filed and served no later than **14** calendar days before
8 the Date and Time of Trial and shall include the names of the
9 witnesses, the subject of their expected testimony, and, where
10 applicable, a statement of the reasons why the testimony cannot
11 properly be introduced by declaration(s) or deposition
12 excerpt(s). Any opposition shall be filed and served no later
13 than **10** calendar days before the Date and Time of Trial. The
14 court will rule on the motion without a hearing. No such motion
15 is required for cross-examination or redirect examination of
16 expert witnesses.

17 On matters other than motions for relief from stay,
18 declarations of non-expert witnesses will not be considered
19 except by stipulation of the parties or prior court approval.

20 **PRE-TRIAL SUBMISSIONS**. Not later than **7** calendar days
21 before the Date and Time of Trial, each party shall:

22 (a) File and serve copies of a trial brief, which shall
23 include a summary of the facts to be proven and the legal
24 theories on which the party relies. Briefs shall not exceed **15**
25 pages without prior permission of the court. The court will not
26 normally request or permit post-trial briefs.

27 (b) On matters other than motions for relief from stay,
28 file and serve a witness list, including a brief summary of the

1 anticipated testimony from each witness. If a party to the
2 matter will be called as a witness (even as an adverse witness)
3 that party's name must be included on the witness list. The
4 presence of a witness' name on the witness list is to alert the
5 court and the other side that the witness may be called. It
6 does not mean that that person will be called. Accordingly,
7 each party is responsible for ensuring the attendance of every
8 witness the party intends to call, whether or not named by the
9 other side. Except in exceptional circumstances, absent consent
10 by the other side, a party will not be allowed to call a witness
11 not named on that party's witness list. This subparagraph shall
12 not apply to impeachment, rebuttal or expert witnesses or their
13 testimony.

14 (c) On motions for relief from stay, file and serve (i) a
15 notice identifying any declaration(s), deposition excerpt(s) or
16 memoranda previously filed in connection with the preliminary
17 hearing and (ii) any additional declarations the party wishes
18 the court to consider.

19 (d) File and serve a list of exhibits the party intends to
20 introduce into evidence (other than those to be used for
21 impeachment or rebuttal). Exhibits that are already on the
22 court's docket do not need to be served but must be listed by
23 docket number and a brief description. Copies of all exhibits
24 not already of the docket must be produced as separately titled
25 pdf files, identifying each exhibit by exhibit number or letter
26 and a brief description. Lengthy exhibits should be bookmarked
27 in order to allow counsel, witness and the court to readily
28 access the relevant portion(s) of the exhibit.

1 Those exhibits shall also be emailed to
2 Montali.Orders@canb.uscourts.gov.

3 Upon receipt of the electronic documents, each attorney and
4 witness shall take the steps necessary to ensure that all
5 electronic documents can be successfully opened and are readily
6 available during the Trial.

7 Exhibits to be used solely for rebuttal or impeachment
8 shall be encrypted in pdf format with a simple user-friendly
9 password. They will be emailed to counsel, the parties, the
10 courtroom deputy only and identified and marked as such when
11 directed by the court.

12 (e) In adversary proceedings, Plaintiff's exhibits should
13 be marked by number and defendant's exhibits should be marked by
14 letter. On motions for relief from stay and other contested
15 matters initiated by motion, Moving Party's exhibits should be
16 marked by number and Respondent's, Debtor's or Trustee's
17 exhibits should be marked by letter. On objections to claim(s)
18 and objections to confirmation of plans, Creditor's exhibits
19 should be marked by number and Debtor's or Trustee's exhibits
20 should be marked by letter.

21 **CONDUCT OF TRIAL VIA VIDEO.** Any witness called to testify
22 at the Trial shall testify by contemporaneous transmission from
23 a different location into the video courtroom (each a "Remote
24 Witness").

25 (a) Each Remote Witness shall be placed under oath and
26 their testimony shall have the same effect and be binding upon
27 the Remote Witness in the same manner as if such Remote Witness
28 were sworn and testified in open court.

1 (b) Each Remote Witness shall provide their testimony from
2 a quiet room and must situate themselves in such a manner as to
3 be able to both view the video and be seen by the court.

4 (c) While the Remote Witness is sworn and testifying: (i)
5 no person may be present in the room from which the Remote
6 Witness is testifying, (ii) the Remote Witness may not have in
7 the room any documents except the exhibits submitted by the
8 parties pursuant to this order and any declaration submitted in
9 lieu of direct testimony, and (iii) may not communicate with any
10 other person regarding the subject of their testimony, by
11 electronic means or otherwise. If the witness or their counsel
12 seek to communicate with one another, either shall openly
13 request a recess for such purpose. If such request is granted
14 by the court, the witness and their counsel may privately confer
15 "offline," i.e., by telephonic means that are not transmitted to
16 the other parties.

17 (d) Remote Witnesses who are testifying as experts must
18 provide advance direct testimony by declaration submitted by the
19 parties pursuant to this order. Remote Witnesses shall be
20 available for cross examination. Failure of a Remote Witness to
21 be available for cross examination may result in striking of the
22 Remote Witness's declaration.

23 **EXPERTS.** The presentation of expert testimony at Trial
24 shall be governed by the following:

25 (a) Direct evidence shall be presented by a declaration
26 that authenticates the report of the expert. See FRCP
27 26(a)(2)(B), incorporated via Fed. R. Bankr. P. 7026. Each
28 party shall file and serve declarations of experts and other

1 documentary evidence related thereto no later than **30** calendar
2 days prior to the Discovery Deadline; provided, however, on
3 motions for relief from stay, such declarations shall be filed
4 and served no later than **14** calendar days prior to the Date and
5 Time of Trial.

6 (b) To cross-examine an opposing party's expert declarant,
7 a party shall notify the opposing party in writing or by e-mail
8 at least **3 court** days before the Date and Time of Trial, in
9 which case the declarant will be required to be available to
10 appear at Trial via Zoom. Any party who fails to notify the
11 opposing party will not be permitted to cross-examine the
12 opposing party's expert. Any party who requests the right to
13 cross-examine an expert and then does not do so will be expected
14 to reimburse the opposing party no less than the expenses
15 incurred in producing the expert at the Trial.

16 If either party anticipates the use of rebuttal expert
17 testimony, counsel should meet and confer regarding the timing
18 of disclosure of such expert, the submission of the expert's
19 report and discovery regarding such expert. If the parties do
20 not reach agreement, the matter should be brought before the
21 court in the same manner as discovery disputes as provided in
22 this order.

23 **PRE-TRIAL OBJECTIONS.** Promptly after receipt of the items
24 mentioned in **PRE-TRIAL SUBMISSIONS**, above, each party must
25 advise the opposing party of any objections to the introduction
26 of testimony or exhibits. Parties must meet and confer before
27 Trial to attempt to reach agreement regarding admissibility.

1 The court expects the parties to make good faith efforts to
2 resolve all evidentiary issues.

3 **MOTIONS IN LIMINE**. If efforts to resolve disputes regarding
4 the introduction of testimony or exhibits are unsuccessful,
5 motions in limine should be filed and served no later than **4**
6 **court** days before the Date and Time of Trial. Such motions
7 should include a certification that the moving party has
8 complied in good faith with the meet and confer requirements of
9 the preceding paragraph. Opposition should be filed and served
10 no later than **1 court** day before the Date and Time of Trial.
11 Motions in limine will be heard at the commencement of Trial.

12 Notwithstanding the foregoing, if a party intends by a
13 motion in limine to exclude an expert or the expert's report,
14 that party should set the motion on the court's regular law and
15 motion calendar, to be heard at least **7** calendar days before the
16 Date and Time of Trial.

17 **STIPULATIONS**. At the commencement of Trial, the parties
18 must be prepared to stipulate into evidence all exhibits that
19 are admissible for at least one purpose. Bona-fide objections
20 may be reserved, with the issue of admissibility deferred until
21 the exhibit is offered into evidence.

22 **ORDER OF PRESENTATION AT TRIAL**. Unless otherwise agreed by
23 the parties or ordered by the court, Plaintiffs in adversary
24 proceedings, moving parties on motions for relief from stay, and
25 claimants on objections to claims will present their cases-in-
26 chief first. On objections to confirmation of plans, debtors or
27 other plan proponents will present their cases-in-chief first.

1 **IMPEACHMENT AND REBUTTAL WITNESSES.** The requirement of
2 advance identification of witnesses and production of exhibits
3 does not apply to witnesses and exhibits presented for purposes
4 of impeachment or rebuttal.² This paragraph supersedes the
5 expert disclosure procedure of FRCP 26(a)(2)(D)(ii),
6 incorporated via Fed. R. Bankr. P. 7026.

7 **DEMONSTRATIVE EVIDENCE.** The court does not want charts,
8 power point presentations, whiteboards, or similar large display
9 items to be used during trial. Parties desiring to summarize,
10 reproduce or display evidence may use the "Share Screen" feature
11 in Zoom, subject to the Court's permission. Any exceptions to
12 this policy should be requested well in advance of trial.

13 **NOTICE TO COURT.** No later than the Monday of the week prior
14 to the Date and Time of Trial, counsel for: Plaintiff (in an
15 adversary proceeding); Moving Party (on a motion for relief from
16 stay); and the Debtor or Trustee (on objections to claim or
17 objection to plan confirmation) **must** telephone or e-mail the
18 court's Calendar Clerk/Courtroom Deputy, Ms. Lorena Parada (415-
19 268-2323; Lorena_Parada@canb.uscourts.gov) and report: whether
20 the parties intend to go forward with the Trial as scheduled; if
21 settlement is likely; whether the time reserved for the Trial is
22 realistic; and any other relevant information.

23
24 ² The proper function of rebuttal evidence is to contradict,
25 impeach or defuse the impact of the evidence offered by an
26 adverse party. Testimony offered only as additional support to
27 an argument made in a case in chief is improper on rebuttal.
28 Peals v Terre Haute Police Dept., 535 F.3d 621, 630 (7th Cir.
2008); see also Daly v. Far Eastern Shipping Co., 238 F.Supp.2d
1231, 1238 (W.D. Wash. 2003), aff'd 108 Fed. Appx. 476 (9th Cir.
2004).

1 **NON-COMPLIANCE**. Any failure of a party to comply timely
2 with this scheduling order may result in judgment against such
3 party, removal of the Trial from calendar, exclusion of evidence
4 or imposition of monetary or non-monetary sanctions. See FRCP
5 16(f) (1) (C), incorporated via Fed. R. Bankr. P. 7016.

6 **DATE AND TIME OF TRIAL**: October 17, 2022, beginning at 9:30
7 AM

8 **TIME RESERVED FOR TRIAL**: One day

9 **DISCOVERY DEADLINE**: September 16, 2022

10 **OTHER PROVISIONS**: Prior to trial (but without court
11 involvement), the court expects counsel to test the adequacy of
12 the audio and video connections and to assure proper connections
13 with their respective clients and witnesses.

14 Although conducted using video conferencing technology, the
15 Trial constitutes a court proceeding. No person shall record,
16 from any location or by any means, the audio or video of the
17 Trial. The audio recording created and maintained by the court
18 shall constitute the official record of the Trial. Further, the
19 formalities of a courtroom shall be observed. Counsel and
20 witnesses shall dress appropriately, exercise civility, and
21 otherwise conduct themselves in a manner consistent with the
22 dignity of the court and its proceedings.

23 **END OF ORDER**

COURT SERVICE LIST

ECF Recipients